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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PACIFIC PINNACLE REAL ESTATE SERVICES, INC., et al., Plaintiffs and Respondents, v. JEREMY R. MELTON et al., Defendants and Appellants.	D073475 (Super. Ct. No. 37-2017-00014660-CU-PA-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Affirmed.

Higgs Fletcher & Mack, John Morris and Rachel E. Moffitt for Defendants and Appellants.

Hahn Loeser & Parks, Steven A. Goldfarb, Michael J. Gleason; Wingert Grebing Brubaker & Juskie, Charles R. Grebing and Ian R. Friedman for Plaintiffs and Respondents.

Jeremy R. Melton and Carol G. Costarakis appeal a judgment against them based on a confirmed arbitration award. Melton and Costarakis (collectively, claimants)

asserted a number of claims in arbitration against their former real estate brokers (Pacific Pinnacle Real Estate Services, Inc., F. George Gilman, and Dale A. Burgett; collectively, Pinnacle) and several real estate service providers (Fidelity National Home Warranty Co., Fidelity National Title Co., Fidelity National Disclosure Source LLC, and Ticor Title Company of California; collectively, Fidelity). Pinnacle and Fidelity prevailed in the arbitration, and the arbitrator awarded them significant attorney's fees.

Pinnacle and Fidelity petitioned the trial court for confirmation of the arbitration award, and claimants petitioned to vacate the award. The court granted the petition to confirm, denied the petition to vacate, awarded additional attorney's fees to Pinnacle and Fidelity, and entered judgment accordingly.

On appeal, claimants contend the judgment must be reversed because (1) the trial court, in previous litigation, erroneously compelled claimants to arbitrate their claims against certain Pinnacle parties; (2) the arbitrator exceeded his authority by refusing claimants' request to voluntarily dismiss Fidelity; (3) the arbitrator exceeded his authority by awarding Fidelity its reasonable attorney's fees; and (4) the trial court improperly awarded Fidelity additional attorney's fees without independently determining Fidelity's contractual entitlement to fees. We conclude claimants have not shown error. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In separate transactions, claimants engaged Pinnacle to exclusively list their homes in San Diego for sale. Each engagement was memorialized by a written Residential Listing Agreement (RLA). Each RLA contained identical dispute resolution

procedures, including an arbitration clause. The arbitration clause stated, in relevant part, as follows: "Seller and Broker agree that any dispute or claim in law or equity arising between them regarding the obligation to pay compensation under this Agreement . . . shall be decided by neutral, binding arbitration . . . ." It identified several required qualifications for any arbitrator, defined the scope of discovery, and specified that any award must be made in accordance with substantive California law. It also specifically excluded several matters from arbitration, e.g., foreclosure proceedings and unlawful detainer actions. Each RLA also contained a clause authorizing an award of attorney's fees under certain circumstances. It stated, "In any action, proceeding or arbitration between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs . . . ."

Claimants ultimately sold their homes with Pinnacle's assistance. Both claimants entered into Residential Purchase Agreements (RPAs) with their respective buyers. Each RPA also contained dispute resolution procedures, including an arbitration clause. The clause itself, in paragraph 17B(1) of each RPA stated, in part, "Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction . . . shall be decided by neutral, binding arbitration, including and subject to paragraphs 17B(2) and (3) below." The remainder of paragraph 17B(1) recited the qualifications of the arbitrator, the scope of discovery, and the application of substantive California law, as noted above.

Paragraph 17B(2) of each RPA excluded certain matters from arbitration, while paragraph 17B(3) expanded the arbitration clause to include brokers. The latter paragraph stated, "Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers, consistent with 17A and B, provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or within a reasonable time after, the dispute or claim is presented to Brokers."

Claimants, as representative plaintiffs in a putative class action, later sued two of the three Pinnacle parties for breach of fiduciary duties, unfair competition, constructive fraud, and other causes of action. (*Melton v. Pacific Pinnacle Real Estate Services, Inc*. (Super. Ct. San Diego County, 2015, No. 37-2014-00043632-CU-BT-CTL) (*Melton*).) Their claims were based on Pinnacle's business relationships with various real estate service providers like Fidelity. Claimants alleged that Pinnacle directed their clients to use these providers, who paid Pinnacle improper kickbacks in exchange. Claimants sought damages as well as disgorgement of any commissions paid by claimants to Pinnacle.

The two Pinnacle parties moved the trial court to compel arbitration of claimants' individual causes of action. While their motion was pending, claimants added three of the Fidelity parties, and one additional party, as defendants. These parties moved to compel arbitration as well.

The *Melton* court heard the Pinnacle parties' motion to compel arbitration first. It found that claimants had agreed to arbitrate their dispute pursuant to arbitration clauses in

both the RLA and the RPA. It therefore granted the Pinnacle parties' motion to compel and stayed claimants' individual claims against them.

Several weeks later, claimants filed a request to voluntarily dismiss the *Melton* lawsuit without prejudice. The court granted claimants' request and dismissed the action in its entirety. It awarded costs to the *Melton* defendants.

After some delay, claimants and Pinnacle agreed on an arbitrator to conduct their arbitration. Claimants then proposed to Fidelity that it join the arbitration as a "compromise" in light of Fidelity's demand for arbitration. Fidelity agreed to take part in the arbitration.

Claimants filed a complaint in arbitration that essentially mirrored their complaint in *Melton*, except that the defendants were the Pinnacle and Fidelity parties also present in this appeal. (One Pinnacle and one Fidelity party were added, and one party that was a defendant in *Melton* was omitted.) Claimants prayed for compensatory damages, punitive damages, and reasonable attorney's fees, among other relief. In response, Pinnacle and Fidelity denied the allegations of the complaint, asserted numerous affirmative defenses, and prayed for reasonable attorney's fees as well.

During the arbitration, claimants filed a document purporting to voluntarily dismiss their claims against Fidelity under Code of Civil Procedure section 581.[1] The document included a signature line for the arbitrator to signify his acceptance of the dismissal. Fidelity objected. It argued that section 581 did not apply to the arbitration

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1 Further statutory references are to the Code of Civil Procedure unless otherwise specified.

and that claimants could not unilaterally dismiss their claims. After an exchange of correspondence, the arbitrator decided that claimants could dismiss their claims, but they may be subject to an award of attorney's fees, costs, and other expenses. Claimants did not pursue the dismissal further.

In advance of the arbitration hearing, claimants submitted a trial brief summarizing their arguments and the relief requested. Claimants again requested reasonable attorney's fees from Pinnacle and Fidelity, citing Civil Code section 1717. Pinnacle requested attorney's fees as well pursuant to the attorney's fees clause in the RLA, whereas Fidelity requested attorney's fees "[a]ssuming *arguendo* [claimants] are correct that the clause applies to the Fidelity Respondents." In their reply, claimants did not address the issue except to pray again for an award of reasonable attorney's fees.

After the hearing, the arbitrator found in favor of Pinnacle and Fidelity, and against the claimants, on all of their claims. The arbitrator invited briefing on Pinnacle and Fidelity's entitlement to attorney's fees and the amount, if any, that should be awarded. Fidelity moved for an award of over $1.5 million in attorney's fees. It cited the RLA's attorney's fees provision and argued that Civil Code section 1717 made the provision applicable to non-signatory Fidelity. Fidelity pointed to claimants' filings in the *Melton* superior court action, where they argued that the statute applied. Fidelity also argued that the arbitrator had the inherent power to award attorney's fees as a matter of equity. Pinnacle filed a motion for attorney's fees as well. It requested approximately $275,000. Claimants opposed both motions.

In his final award, the arbitrator found that Fidelity and Pinnacle were prevailing parties entitled to attorney's fees under the RLA. The arbitrator wrote, "Because Claimants asserted a claim for a refund of their respective real estate commissions, this case involved compensation due to the broker under the [RLA]. Therefore, this case is an action on a contract." He awarded Fidelity $875,000 and Pinnacle approximately $310,000 in attorney's fees and costs.

Pinnacle and Fidelity filed a petition to confirm the arbitration award in a new superior court action. (*Pacific Pinnacle Real Estate Services, Inc. v. Melton* (Super. Ct. San Diego County, 2017, No. 37-2017-00014660-CU-PA-CTL) (*Pinnacle*).) They also filed a notice of related case, which identified the dismissed *Melton* action. Claimants filed a competing petition to vacate the award, also in the new *Pinnacle* action. The *Pinnacle* action was eventually assigned to the same superior court judge who presided over the *Melton* action.

At a status conference, claimants told the court they intended to reopen *Melton* and move to coordinate it with *Pinnacle*. Claimants explained that they could not appeal the *Melton* order compelling arbitration and they believed coordinating the two cases would be the appropriate way to address that issue. The court remarked, "Well, it sounds like you blew the time period within which to file an appeal and you want your action [revived] so you get the clock reset. I'm not going to do that. It was dismissed." After some further discussion, the court indicated that it would consider whatever motion claimants wished to file. Claimants did not raise the issue again.

In their petition to vacate, claimants argued that the arbitrator exceeded his authority by failing to dismiss Fidelity and by awarding it attorney's fees, among other things. After briefing and oral argument, the court denied claimants' petition to vacate and confirmed the arbitration award. The court found that Fidelity's dismissal and its fee award were issues properly submitted to the arbitrator. The arbitrator's rulings on these issues were therefore unreviewable for errors of fact or law. The court also found that the arbitrator did not prevent claimants from dismissing Fidelity; he merely warned claimants that their dismissal could have consequences. Claimants subsequently withdrew their dismissal request. The court entered a judgment confirming the arbitration award and reserved the issue of attorney's fees and costs.

Fidelity moved for an award of attorney's fees covering the *Pinnacle* confirmation action. Claimants opposed. They argued that Fidelity was not a signatory to the RLA, which contained the attorney's fees provision, and Civil Code section 1717 did not apply to extend the provision to Fidelity. Pinnacle also moved for a fee award.

The court granted both motions. As to Fidelity, the court reasoned that the issue of its entitlement to attorney's fees had already been litigated and decided in arbitration. The court declined to reconsider the issue. It therefore considered only the reasonableness of Fidelity's fee request of approximately $130,000. It found the hours claimed were somewhat excessive and awarded $95,000. It also awarded approximately $20,000 in attorney's fees to Pinnacle. The court amended its judgment to reflect the fee awards.

Claimants appeal. Their notice of appeal was filed in the *Pinnacle* action, and it identifies the *Pinnacle* judgment as the judgment or order appealed. The *Melton* action is not mentioned.

DISCUSSION

I

Order Compelling Arbitration

Claimants first contend the judgment must be reversed because the trial court in *Melton* erred by ordering claimants to arbitrate their dispute with two of the three Pinnacle parties. Pinnacle responds that the *Melton* order compelling arbitration is not reviewable on appeal from the judgment here, which was entered in the separate *Pinnacle* confirmation action. And, on the merits, Pinnacle argues the *Melton* order correctly compelled arbitration of the dispute. We agree with Pinnacle on both issues.

A

It is undisputed that the *Pinnacle* judgment is appealable. (§ 1294, subd. (d).) The question here is whether the *Melton* order is reviewable in an appeal from that judgment. The relevant statute provides, "Upon an appeal from any order or judgment under this title, the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party." (§ 1294.2.)

Under normal circumstances, an order compelling arbitration is reviewable on appeal from the judgment confirming the arbitration award. "[T]he intermediate order compelling arbitration meets all three statutory criteria: it involves the merits of the

controversy, it necessarily affects the judgment, and it substantially affects plaintiff's rights." (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 649.) The statutory scheme contemplates that an order compelling arbitration will be, in fact, an intermediate order in the action that results in a judgment confirming an arbitration award. Where an arbitrable dispute is the subject of a court action, any petition to compel arbitration must be filed in that action. (§ 1292.4.) If the court grants the petition, it must, at the request of a party, stay the action pending the outcome of the arbitration or some other event. (§ 1281.4; see § 1292.8.) Any subsequent petition, e.g., a petition to confirm the resulting award, must be filed in the same action. (§ 1292.6.) If the award is confirmed, the court must enter a final judgment reflecting the award. (§ 1287.4.)

Here, claimants filed the *Melton* action, and Pinnacle responded with a petition to compel arbitration. The court granted the petition and ordered a stay of claimants' individual claims against Pinnacle. Rather than following the statutory scheme, however, claimants voluntarily dismissed *Melton* without prejudice. After the arbitration, when Pinnacle and Fidelity petitioned the court to confirm the award, *Melton* was no longer pending. They therefore instituted a new action, *Pinnacle*, which resulted in the judgment on appeal here. Under these circumstances, the *Melton* order is not an "intermediate order" to the *Pinnacle* judgment, and it is not reviewable in this appeal. We have no jurisdiction to review intermediate orders entered in another action—even where that action is related. (See *Lin v. Jeng* (2012) 203 Cal.App.4th 1008, 1027.)

Claimants point out that they could not have appealed the *Melton* order compelling arbitration. That is correct. But it does not follow that the *Melton* order must be

reviewable now. The *Melton* order would have been reviewable from a final judgment in *Melton*, but claimants' voluntary dismissal prevented that from occurring. "That dismissal had consequences. 'A plaintiff's voluntary dismissal of his action has the effect of an absolute withdrawal of his claim and leaves the defendant as though he had never been a party. [Citations.] When [as in this case] an action is wilfully dismissed by the plaintiff against . . . a sole defendant it is as though no action had ever been filed.' [Citation.] '[I]t is a well-settled proposition of law that where the plaintiff has filed a voluntary dismissal of an action . . . , the court is without jurisdiction to act further [citations], and any subsequent orders of the court are simply void.' " (*Paniagua v. Orange County Fire Authority* (2007) 149 Cal.App.4th 83, 89; accord, *Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1108.)

Claimants rely on *Muao v. Grosvenor Properties Ltd.* (2002) 99 Cal.App.4th 1085, but it is inapposite. In *Muao*, the trial court incorrectly dismissed, rather than stayed, the court action after granting a petition to compel arbitration. (*Id*. at p. 1093.) The plaintiff, who opposed the petition to arbitrate, appealed. (*Id*. at p. 1087.) The reviewing court in *Muao* refused to consider whether the trial court erred by granting the petition to compel because such an order is only reviewable on appeal from a judgment entered after the arbitration is completed. (*Id*. at pp. 1088-1089.) It directed the trial court to vacate its dismissal order and stay the action pending arbitration. (*Id*. at p. 1093.)

Muao confirms that an order compelling arbitration is not immediately appealable, but it does not speak to the unusual circumstances here. It is immaterial that claimants could not appeal their *Melton* dismissal and seek review of the order compelling

arbitration because claimants did not have to dismiss *Melton* at all. Having done so, however, they cannot seek review of intermediate orders in that now-defunct action.[2]

B

Even if we were able to review the *Melton* order on its merits, we would not find error. "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists," subject to certain exceptions not applicable here. (§ 1281.2.) The statutory scheme "reflect[s] a ' "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." ' [Citation.] When the parties to an arbitrable controversy have agreed in writing to arbitrate it and one has refused, the court, under section 1281.2, must ordinarily grant a petition to compel arbitration." (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25-26, fn. omitted.)

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th

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2 Pinnacle has filed a motion to dismiss claimants' appeal to the extent it seeks review of the *Melton* order compelling arbitration. Although we agree with Pinnacle that the order is unreviewable in this appeal, we do not agree that partial dismissal is an appropriate remedy. (See, e.g., *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 949, fn. 6 (*Cahill*).) In their notice of appeal, claimants have identified only the *Pinnacle* judgment as the appealed order or judgment. They do not identify the *Melton* order. The *Pinnacle* judgment is appealable, so we have jurisdiction over the entirety of claimants' appeal. Pinnacle's motion is therefore denied.

394, 413.) "Although '[t]he law favors contracts for arbitration between parties' [citation], ' "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . ." ' [Citations.] In determining the scope of an arbitration clause, '[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].' " (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744 (*Victoria*).)

"Where there is no '*factual* dispute as to the language of [the] agreement' [citation] or 'conflicting extrinsic evidence' regarding the terms of the contract [citation], our standard of review of a trial court order granting or denying a motion to compel arbitration under section 1281.2 is de novo." (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1061-1062.)

The trial court relied on two arbitration clauses, in the RLA and the RPA, to find that claimants had agreed to arbitrate their dispute with Pinnacle. The RLA provides, "Seller and Broker [i.e., Pinnacle] agree that any dispute or claim in law or equity arising between them regarding the obligation to pay compensation under this Agreement . . . shall be decided by neutral, binding arbitration . . . ." The RPA provides, "Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers, consistent with 17A and B, provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or within a reasonable time after, the dispute or claim is presented to Brokers."

Claimants contend that neither clause applies to their dispute with Pinnacle. As to the RLA, they argue that this dispute does not involve an "obligation to pay compensation under [the] Agreement" because the gravamen of their complaint was Pinnacle's undisclosed relationships with third parties like Fidelity. As to the RPA, claimants argue that the broker arbitration clause applies only in disputes between claimants (as sellers) and any buyers, not disputes between claimants and their brokers only.

Both of claimants' arguments were addressed and rejected in *Laymon v. J. Rockcliff, Inc.* (2017) 12 Cal.App.5th 812 (*Laymon*), which interpreted identical language in the context of a substantively indistinguishable dispute. *Laymon* concluded that both the RLA and the RPA required arbitration. (*Id*. at p. 825.)

Laymon noted that the dispute involved an explicit prayer for disgorgement—also present here—that necessarily implicated the "obligation to pay compensation" under the RLA. (*Laymon, supra*, 12 Cal.App.5th at p. 821.) *Laymon* explained, "Although the complaints do not specify their theory of disgorgement, the remedy is ordinarily in the nature of restitution—that is, a return of money obtained through wrongful means. [Citations.] Alternatively, disgorgement can be granted as a form of penalty for ' "misconduct, breach of conduct [sic] or wilful disregard, in a material respect, of an obligation imposed upon [a broker] by the law of agency." ' [Citation.] Either way, in seeking the remedy of disgorgement plaintiffs are contending the broker defendants were not entitled to retain the compensation paid to them under the RLA, a claim that self-evidently implicates plaintiffs' 'obligation to pay' the commissions." (*Ibid*.)

Turning to the RPA, *Laymon* described claimants' interpretation as "untenable." (*Laymon*, *supra*, 12 Cal.App.5th at p. 822.) Although the RPA provides that any arbitration between sellers and brokers must be "consistent with" other paragraphs of the RPA, that language does not limit such arbitration only to disputes between buyers and sellers. (*Ibid*.) *Laymon* explained, "[P]aragraph 17B of the 2007 RPA (1) requires buyers and sellers to arbitrate any dispute, (2) specifies the qualifications of the arbitrator, (3) establishes the applicable substantive and procedural law, (4) authorizes discovery, (5) specifies a series of matters excluded from the requirement of arbitration, and (6) requires arbitration of broker/party disputes upon agreement of the broker. Even more than paragraph 17A, paragraph 17B goes well beyond merely requiring the arbitration of party/party disputes. Again, a reasonable reading of the requirement in paragraph 17B(3) of consistency with paragraph 17B is that the various conditions established in paragraph 17B, particularly the constraints imposed on arbitration and the exclusions from arbitration, apply to party/broker arbitration as well as to arbitration between the parties. . . . In short, while the drafting of the clause is far from clear, the most sensible reading of the consistency requirement is not that party/broker arbitration is limited to disputes involving both parties, but that party/broker arbitration is subject to the same conditions imposed on party/party arbitration by paragraphs 17A and 17B." (*Id*. at pp. 822-823.)

Claimants point out that *Laymon* is not binding on this court. They are correct, but we do not lightly cast it aside. "We, of course, are not bound by the decision of a sister Court of Appeal. [Citation.] But '[w]e respect stare decisis, however, which serves the

important goals of stability in the law and predictability of decision. Thus, we ordinarily follow the decisions of other districts without good reason to disagree.' " (*The MEGA Life & Health Insurance Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529.)

Claimants have not provided any good reason to disagree with *Laymon*. Their arguments were largely addressed and rejected by *Laymon*, and we reject them for the same reasons. Claimants contend that *Laymon* conflicts with the Supreme Court's opinion in *Victoria*, *supra*, 40 Cal.3d 734, but the two situations are not comparable. In *Victoria*, the Supreme Court found that an arbitration clause covering "services"—defined in the agreement as medical and hospital services—did not require arbitration of a cause of action for negligent employment of an individual accused of sexually assaulting a patient. (*Id.* at pp. 742-745.) Here, while the RLA described Pinnacle's potential "compensation" in specific terms, the arbitration clause was not limited to disputes over those terms. Instead, it covered the "obligation to pay compensation" in general, which is plainly implicated by claimants' prayer that such compensation must be disgorged. Claimants do not address *Laymon*'s discussion of the RPA at all.

In sum, we conclude that the *Melton* order compelling arbitration of the dispute between claimants and Pinnacle is not reviewable in the present appeal. But, even if we were to review the order, we would find no error. The *Melton* court properly granted Pinnacle's petition to compel arbitration.

II

Petition to Vacate the Arbitration Award

Claimants further contend the trial court should have granted their petition to vacate the arbitration award (and denied Pinnacle and Fidelity's petition to confirm) because the arbitrator exceeded his powers by (1) refusing to enter claimants' voluntary dismissal of Fidelity and (2) awarding Fidelity its reasonable attorney's fees. We again review the trial court's ruling de novo. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9 (*AMD*).)

A

"[A]n award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction)." (*Moncharsh v. Heily & Blaise* (1992) 3 Cal.4th 1, 33 (*Moncharsh*).) These sections require a trial court to vacate or correct an award where "[t]he arbitrators exceeded their powers." (§§ 1286.2, subd. (a)(4), 1286.6, subd. (b).) "[H]owever, this provision does not supply the court with a broad warrant to vacate awards the court disagrees with or believes are erroneous." (*Gueyffier v. Ann Summers Ltd.* (2008) 43 Cal.4th 1179, 1184 (*Gueyffier*).)

"When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case.

Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for ' "[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." ' " (*Gueyffier, supra,* 43 Cal.4th at p. 1184.) " 'In other words, it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible.' " (*Moncharsh, supra,* 3 Cal.4th at p. 12.) "Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Id*. at p. 11.)

"In cases involving private arbitration, '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and ' "[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission." ' " (*Moncharsh, supra,* 3 Cal.4th at p. 8.) "However, the parties may submit for decision issues they were not contractually compelled to submit to arbitration. In such an event, courts look both to the contract and to the scope of the submissions to determine the arbitrator's authority." (*J.C. Gury Co. v. Nippon Carbide Industries (USA) Inc.* (2007) 152 Cal.App.4th 1300, 1305 (*J.C. Gury*); accord, *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1437-1438 (*Greenspan*).)

B

Claimants first argue the arbitrator exceeded his powers by refusing to enter claimants' voluntary dismissal of Fidelity (and subsequently ruling on the merits of

claimants' dispute with Fidelity). Claimants rely on section 581, which allows plaintiffs in superior court to voluntarily dismiss their claims against a defendant prior to the commencement of trial. They claim that statute applies in arbitration, that their voluntary dismissal deprived the arbitrator of jurisdiction over Fidelity, and that any further action was in excess of the arbitrator's power.

Claimants' argument ignores the limited scope of our review. We may not consider the merits of the arbitrator's actions. We may only consider whether the issue was within his power to determine. "[C]onsistent with our arbitration statutes [and subject to limited exceptions], it is within the 'powers' of the arbitrator to resolve the entire 'merits' of the 'controversy submitted' by the parties. (§ 1286.2, subd. (d); § 1286.6, subd. (b), (c).) Obviously, the 'merits' include all the contested issues of law and fact submitted to the arbitrator for decision." (*Moncharsh, supra,* 3 Cal.4th at p. 28.) Claimants and Fidelity voluntarily submitted the present controversy between them to arbitration. The arbitrator had the power to determine all issues he believed were necessary for his ultimate decision. (*AMD*, *supra*, 9 Cal.4th at p. 372.)

Claimants have not pointed to any limitation, contractual or otherwise, on the arbitrator's power to decide whether and on what terms claimants may voluntarily dismiss their claims. (Cf. *Gueyffier, supra,* 43 Cal.4th at p. 1185 ["An exception to the general rule assigning broad powers to the arbitrators arises when the parties have, in either the contract or an agreed submission to arbitration, explicitly and unambiguously limited those powers."].) Once the controversy was submitted to the arbitrator, it was the arbitrator who was empowered to dispose of it. A necessary predicate to deciding the

case was determining how to handle all issues raised by claimants' efforts to voluntarily dismiss Fidelity. Claimants therefore have not shown that the arbitrator exceeded his power by deciding that issue.

Claimants cite *National Union Fire Insurance Co. v. Stites Professional Law Corporation* (1991) 235 Cal.App.3d 1718 (*National Union*) for the proposition that an arbitrator exceeds his power when he acts without subject matter jurisdiction. *National Union*, however, involved an attorney-client arbitration mandated by Business and Professions Code section 6200. (*National Union*, at p. 1722.) A client initiated arbitration, but the attorney refused to participate. (*Ibid*.) The arbitrators made an award in favor of the client. (*Ibid*.) When the client sought to confirm the award, the trial court refused. It found that the purported client did not have an attorney-client relationship with the attorney, and therefore the mandatory arbitration statute did not apply. (*Id*. at p. 1723.) The reviewing court agreed. It stated, "[W]e find there was a rational basis for concluding that National was not Stites's client[,] and because arbitration pursuant to [Business and Professions Code] section 6200 et seq. applies only to attorney-client fee disputes, the trial court could reasonably refuse to confirm the arbitration award." (*Id*. at p. 1728.)

Here, by contrast, claimants and Fidelity *agreed* to arbitrate their dispute. The arbitration at issue here was voluntary; it was not a creature of statute. We therefore do not look to any statute to determine the scope of the arbitrator's power. We look to the parties' arbitration agreement and their submissions to the arbitrator. As explained above, the dispute submitted to the arbitrator necessarily included whether and on what terms

claimants could voluntarily dismiss their claims against Fidelity. The arbitrator's rulings on this issue are therefore binding on the parties, and we may not review them for errors of fact or law.

C

Claimants next argue the arbitrator exceeded his powers by awarding attorney's fees to Fidelity. Claimants assert that the arbitrator misinterpreted the RLA and Civil Code section 1717 in making the award, thereby exceeding his powers. Again, however, the question in this appeal is not whether the arbitrator erred. It is whether claimants and Fidelity agreed to submit the issue of attorney's fees to the arbitrator for his decision. (*Gueyffier, supra*, 43 Cal.4th at p. 1184; *Moncharsh, supra*, 3 Cal.4th at p. 28.)

Our Supreme Court considered an arbitrator's power to award attorney's fees in *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782 (*Moore*). In that case, the arbitrators refused to award the prevailing plaintiffs their attorney's fees. (*Id*. at p. 784.) Plaintiffs challenged this refusal as in excess of the arbitrators' powers because the underlying contract contained an attorney's fees clause. (*Ibid*.) The trial court declined to vacate or correct the award, and the Supreme Court agreed. (*Ibid*.) The Supreme Court reasoned, "[T]he entire controversy, including all questions as to the ingredients of the award, was in fact submitted to the arbitrators in this case. Plaintiffs submitted the question of fees to the arbitrators, first, by submitting the entire controversy created by the pleadings, including the prayer for fees contained in their complaint, and, second, by actually requesting the award of fees from the arbitrators themselves. Having submitted the fees issue to arbitration, plaintiffs cannot maintain the arbitrators exceeded their

powers, within the meaning of section 1286.6, subdivision (b), by deciding it, even if they decided it incorrectly." (*Id.* at p. 787.)

Here, like *Moore,* claimants and Fidelity agreed to submit their entire dispute to the arbitrator for decision, including the issue of attorney's fees. Claimants and Fidelity were not compelled to arbitrate; they agreed to do so. Claimants' complaint in arbitration sought attorney's fees from Fidelity, and Fidelity's answer sought the same from claimants. Claimants' trial brief likewise sought attorney's fees from Fidelity, citing Civil Code section 1717. Fidelity's trial brief sought attorney's fees "[a]ssuming *arguendo* [claimants] are correct that the clause applies to the Fidelity Respondents." In reply, claimants did not disclaim or modify their request for fees from Fidelity. The issue of attorney's fees between claimants and Fidelity was presented to the arbitrator for his decision. It was therefore within his power to decide. (See *Moore, supra,* 22 Cal.4th at p. 787; see also *Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1314 ["The arbitrator did not exceed his powers in awarding fees because Harris and Sandro both requested an award of attorneys fees in the arbitration."].) Whether the arbitrator made the correct decision is beyond our power to review. (*Moore,* at p. 787.)

Claimants argue that the issue of a fee award could not have been submitted to the arbitrator because the text of the RLA (in claimants' view) does not allow an award in favor of Fidelity. Claimants are incorrect.

First, the scope of a dispute subject to arbitration is not merely defined by contract. It can be expanded by the parties' submissions, which here clearly included the issue of attorney's fees. (See *Greenspan, supra,* 185 Cal.App.4th at pp. 1437-1438; *J.C. Gury*

Co., *supra*, 152 Cal.App.4th at p. 1305.) This principle is especially true where, as here, the parties have submitted voluntarily to arbitration.

Second, the RLA does not reflect the type of express and unambiguous prohibition that courts will interpret to limit an arbitrator's power. (See *Gueyffier*, *supra*, 43 Cal.4th at p. 1185.) Instead, as evidenced by the parties' submissions, the language was subject to competing interpretations, including the effect of Civil Code section 1717. "Far from conflicting with the express terms of the contract, therefore, the award was plainly based on 'the underlying contract as interpreted, expressly or impliedly, by the arbitrator.' " (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 778 (*Moshonov*).)

Delaney v. Dahl (2002) 99 Cal.App.4th 647 (*Delaney*) is instructive. In that case, an arbitrator awarded attorney's fees to a prevailing law firm. (*Id*. at p. 653.) The losing plaintiff challenged the award on the ground that the underlying contract prohibited an award of attorney's fees against him. (*Id*. at p. 654.) The trial court rejected that challenge, and the reviewing court agreed. (*Ibid*.) It explained, "[I]n the present case, the arbitrator interpreted the retainer agreements to provide for an award of attorney fees against [the plaintiff] for fees incurred in the arbitration proceeding. The arbitrator considered [plaintiff's] handwritten changes to the supplemental retainer agreement. While [plaintiff] tries to style the arbitrator's decision as one exceeding the limits of the powers conferred by the retainer agreements, he is really just arguing the arbitrator wrongly interpreted the written contract on the issue of liability for fees incurred during the arbitration itself. This contractual interpretation is precisely the type of decision by an arbitrator to which courts must grant deference." (*Id*. at pp. 655-656.)

Here, the parties submitted the meaning and effect of the attorney's fee clause to the arbitrator for decision. Based on those submissions, the arbitrator interpreted the clause to allow Fidelity to recover its attorney's fees. Just as in *Delaney*, we may not review the correctness of the arbitrator's interpretation.

Claimants rely heavily on *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809 (*DiMarco*), but that opinion is not persuasive. *DiMarco* held that an arbitrator exceeded his power where he designated a prevailing party but refused to award that party its attorney's fees. (*Id*. at p. 1815.) It reasoned that, because the underlying contract stated that the prevailing party *shall* recover its attorney's fees, the arbitrator was not empowered to refuse to award such fees. (*Ibid.*)

DiMarco was decided before our Supreme Court's discussions of fee awards in *Moore* and *Moshonov*. In both opinions, the Supreme Court refused to endorse *DiMarco*'s reasoning. (*Moore*, *supra*, 22 Cal.4th at pp. 787-788; *Moshonov*, *supra*, 22 Cal.4th at p. 779.) This court, likewise, has declined to follow *DiMarco*. (*Safari Associates v. Superior Court* (2014) 231 Cal.App.4th 1400, 1412-1413 (*Safari Associates*).)

Subsequent caselaw has made clear that an arbitrator does not exceed his powers anytime his fee award appears to contradict the terms of the parties' agreement. Instead, there must be an explicit and unambiguous agreement to limit the arbitrator's power to award fees. (*Gueyffier*, *supra*, 43 Cal.4th at p. 1185.) Where no such explicit and unambiguous limitation appears, interpretation of the contract is solely a matter for the arbitrator, and his interpretation will be binding on the parties. (See *Moshonov*, *supra*,

22 Cal.4th at p. 779 ["Interpretation of the contract underlying this dispute being within the matter submitted to arbitration, such an interpretation could amount, at most, to an error of law on a submitted issue, which we have held is not in excess of the arbitrator's powers within the meaning of sections 1286.2 and 1286.6."]; see also *Safari Associates, supra*, 231 Cal.App.4th at pp. 1412-1413; *Delaney*, *supra*, 99 Cal.App.4th at pp. 655-656.)

For the foregoing reasons, claimants have not shown the arbitrator exceeded his power in making his award.

III

The Court's Fee Award

In their opening brief on appeal, claimants contend the trial court erred by awarding Fidelity additional attorney's fees for the court proceedings to confirm the arbitration award. Claimants argue the trial court should not have accepted the arbitrator's conclusion that Fidelity was entitled to attorney's fees under the RLA. Fidelity responds that the court properly gave effect to the arbitrator's determination under the doctrine of issue preclusion. (See, e.g., *Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335-1336 (*Kelly*) ["It is . . . appropriate to give collateral estoppel effect to findings made during an arbitration, so long as the arbitration had the elements of an adjudicatory procedure."]; *Gordon v. G.R.O.U.P.* (1996) 49 Cal.App.4th 998, 1010 (*Gordon*) ["At a minimum, these express and implied findings were binding on appellants."].)

Claimants do not mention this contention in their reply brief, and they do not respond to Fidelity's arguments. Under these circumstances, we conclude claimants have abandoned their contention that the trial court erred in awarding additional attorney's fees to Fidelity for the confirmation proceedings. (See *The Police Retirement System of St. Louis v. Page* (2018) 22 Cal.App.5th 336, 346, fn. 3; *Overstock.com, Inc. v. Goldman Sachs & Co.* (2014) 231 Cal.App.4th 513, 530, fn. 11; *Schwartz v. Fay* (1941) 48 Cal.App.2d 446, 448.)

In any event, even if claimants had not abandoned their contention, we would conclude they have not shown prejudicial error. They have not established that the trial court erred by giving preclusive effect to the arbitrator's determination that Fidelity was entitled to attorney's fees. The sole authority cited by claimants, *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508, held that a trial court must independently assess whether a party seeking attorney's fees was a prevailing party in the confirmation action. (*Id*. at pp. 513-514.) But claimants do not argue that Fidelity was not the prevailing party in the confirmation action, so that authority does not assist them. And, with respect to the remaining issues, claimants have not shown that issue preclusion would not apply or that the court otherwise prejudicially erred. (See *Kelly*, *supra*, 67 Cal.App.4th at pp. 1335-1336; *Gordon*, *supra*, 49 Cal.App.4th at p. 1010; see also *Cahill*, *supra*, 194 Cal.App.4th at p. 956 [" 'We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' "].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.